Supreme Court, U.S.
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No. 98-655

In The

Supreme Court of the United States

October Term, 1998

LEONARD S. SANDS, FIRST PACIFIC BANCORP and PACVEN, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

In opposition to the petition for certiorari, the SEC argues that even if the million-dollar Savoy (Kutik) check had been "a bona fide independent investment and was received by the minimum-sale deadline," the offering nevertheless would have failed because the $500,000 received from PacVen "was not a bona fide investment by unaffiliated purchasers." Respondent's brief in opposition at 8-9. The SEC concludes that "A decision favorable to petitioners on the question they seek to present would accordingly result in no change in the judgment in this case. *Id.* at 9.

Even if the offering would have failed because of the PacVen funds, the ruling of the Court of Appeals distinguishing receipt of a check from receipt of cash is not harmless error. On the contrary, Sands' treatment of the check as cash was the main factor in the Court of Appeals' decision to affirm the discretionary penalty imposed by the District Court.

The District Court's order imposing a penalty of disgorgement and a lifetime bar was the primary issue before the Court of Appeals, and Sands' treatment of the check was the primary factor invoked to justify the penalty. As the court wrote, "The transaction which underlies most of the issues in this appeal was the Bancorp's 1987 public offering of securities." (App. A at 7a). In evaluating the 1987 public offering, the court discussed the Savoy check at length, *id.* at 8a, 10a-12a, while it only made brief reference to the funds received from PacVen. *Id.* at 8a, 13a.

Since Sands' acceptance of the check was the Court of Appeals' main justification for affirming the penalty imposed by the District Court, the propriety of Sands' action is a justiciable issue regardless of whether the PacVen contribution would have constituted independent grounds for voiding the offering.

CONCLUSION

For these reasons, as well as those stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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